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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The plain meaning of 8 U.S.C. § 1231(b)(2), which governs the selection of countries to which aliens may be removed, requires there to be a functioning government in the country of removal that will accept the alien. The statutory language does not support respondent's claim that the statute grants the Attorney General discretion to deport the alien to the country of which the alien is a subject, national, or citizen, when no government exists to accept the alien or when a government in that country refuses acceptance—just because that country also happens to be the alien's country of birth.

Requiring acceptance by the government of the removal country as a condition of deportation fosters the interest of the United States in stable and orderly repatriation. Congress did not just authorize removal of aliens out of the country and grant the Executive the discretion to adopt rules and regulations as it saw fit to accomplish the task. Rather, the statute sets forth a carefully prescribed step-by-step process with various limitations including the order in which countries should be chosen for removal, the identity of those countries, the timing of removal, and the consequences of an inability to remove. These limitations reflect the importance to the United States of a stable and orderly removal process. There is no exception in the statute that eliminates the acceptance requirement when acceptance cannot be obtained because the targeted country of removal is a failed state with no government to accept the alien. If such an exception is to be created, it should not be by administrative fiat.

ARGUMENT

I. Removal Under 8 U.S.C. § 1231(b)(2) Requires Acceptance From The Government Of The Receiving Country.

A. The Plain Language Of The Statute Requires Acceptance At Each Step.

1. *As A Somali National, Petitioner Cannot Be Removed To Somalia Without Acceptance.*

The most common country of removal is the country of which the alien is a "subject, national, or citizen." § 1231(b)(2)(D).[1] Should the country of nationality not accept the alien, § 1231(b)(2)(D) does not grant the Attorney General the discretion to "remove anyway." If Congress had intended to give the Attorney General discretion to remove the alien to a country of nationality despite the inability to get acceptance from a government in that country, then it would have included language in § 1231(b)(2)(D) granting such discretion. Congress has done so in other immigration and removal statutes. *See, e.g.*, 8 U.S.C. § 1231(a)(3) (an alien not removed shall be "subject to supervision under regulations prescribed by the Attorney General"); § 1231(a)(4)(B)(i) (authorizing Attorney General to remove certain imprisoned aliens before completion of sentence if he determines removal is "appropriate and in the best interest of the United States"). Indeed, respondent argues that Congress granted discretion in another part of § 1231(b)(2) itself, by specifying—as it did not do in § 1231(b)(2)(D)—that the Attorney General "may" disregard an alien's designation under some circumstances. § 1231(b)(2)(C). This provision

[1] Respondent refers to petitioner as a "citizen of Somalia," Resp. Br. 8, and also as a "citizen and national of Somalia," Br. in Opp'n 3. Generally, respondent refers to the "country of which the alien is a subject, national, or citizen" under § 1231(b)(2)(D) as the "country of nationality." Resp. Br. 21. Petitioner adopts this abbreviated reference.

makes the absence of discretion in § 1231(b)(2)(D) all the more conspicuous.[2]

That lack of discretion ends the possibility of removing petitioner to Somalia. Section 1231(b)(2)(D) provides that the Attorney General shall remove to the country of nationality "unless" there is no acceptance by the government. Since Somalia is petitioner's country of nationality, and Somalia has not accepted him, petitioner cannot be removed to Somalia at this time.

Respondent attempts to avoid this obstacle by arguing that § 1231(b)(2)(D) and § 1231(b)(2)(E) together "preserve[] Executive Branch discretion by allowing the Secretary to choose among a larger number of potential removal countries (those identified in § 1231(b)(2)(E)) and to avoid unwanted confrontations with foreign governments." Resp. Br. 21. But § 1231(b)(2)(E) does not add the explicit grant of discretion missing in § 1231(b)(2)(D). Rather, subparagraph (E) provides a list of "additional" countries to which the Attorney General may remove the alien if removal cannot be accomplished because the Attorney General cannot obtain acceptance from the government of the country of nationality. Neither § 1231(b)(2)(D) nor § 1231(b)(2)(E) contains any language suggesting that the Attorney General may overcome the lack of acceptance from the government of the country of nationality simply by removing the alien to that country in a manner that the Attorney General decides is in the national interest.

Respondent explains this discrepancy by stating that if, but only if, the country of nationality also happens to be one

[2] The parties agree that petitioner was not removed to Somalia, his country of nationality, under § 1231(b)(2)(D). Resp. Br. 16-17. The inability to remove petitioner under step two coupled with the failure to find an "additional country" as required under step three should have ended the removal efforts to Somalia until a recognized government in Somalia emerges to accept his return.

of the countries listed in § 1231(b)(2)(E)(i)–(vi), then the Attorney General can exercise the discretion missing in § 1231(b)(2)(D). Resp. Br. 16-17. Congress should not be presumed to have established a haphazard scheme of discretion running in and out of the removal process.

Respondent argues that it was important to Congress that the Attorney General have authority to decide whether acceptance from a functioning government should be required on a case-by-case basis. Resp. Br. 13. But respondent's interpretation is ad-hoc and unfaithful to the text. It makes no sense to limit the Attorney General's power to override a lack of acceptance to *only* the countries listed in § 1231(b)(2)(E)(i)–(vi). If Congress had intended to grant the Attorney General discretion, it could have provided simply that "the Attorney General shall remove the alien outside the United States unless the Attorney General decides that it would be prejudicial to the interests of the United States to do so." What Congress did instead in step three was provide a list of other countries that the Attorney General could turn to if the alien could not be removed to the country of nationality because there was no acceptance.

2. *Acceptance Is Required By All Subparts Of § 1231(b)(2)(E).*

Because petitioner is a Somali national his removal is governed by § 1231(b)(2)(D), and the Attorney General cannot slip the bonds of subparagraph (D) by then selecting Somalia as the country of birth under § 1231(b)(2)(E)(iv). Moreover, even if Somalia were not the country of nationality (but happened still to be the country of birth), § 1231(b)(2)(E)(iv) would nevertheless require acceptance from a government there.

Respondent argues that § 1231(b)(2)(D) mentions acceptance from the country of nationality while the first six subparts of § 1231(b)(2)(E) do not and suggests that Congress acted purposefully in this "omission." Resp. Br.

25. Section 1231(b)(2)(D), however, does not *add* an acceptance requirement that is then omitted from subparagraph (E).[3] Rather, acceptance by the country of removal is a precondition for any removal. The use of the word "unless" does not indicate an additional requirement to the general rule but an exception to that rule when a condition of performance—acceptance—is not met.

If there is no acceptance under § 1231(b)(2)(D), then the Attorney General must move to the list of other countries in step three, § 1321(b)(2)(E). It was unnecessary to add a clause with the words "unless the government of the country does not accept" as a modifier or preamble to the six countries listed in § 1231(b)(2)(E)(i)–(vi) because step three is the final step of the process. Reaching this step means that at least one country has already failed to accept the alien, and he cannot be removed to that country—even if the non-accepting country happens also to be listed in § 1231(b)(2)(E).

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[3] Respondent argues that under *Russello v. United States*, 464 U.S. 16 (1983), omission of an acceptance requirement from § 1231(b)(2)(E)(i)–(vi) must be deemed intentional to the extent the requirement is present in earlier subparagraphs. Resp. Br. 25. Acceptance, however, is a necessary condition to any removal in the statute, not an add-on that is later omitted. Respondent also misapprehends *Russello*, which simply looked to the RICO statute as a whole and construed it to avoid a redundant interpretation of two similar definitional provisions. *See* 464 U.S. at 23. Moreover, *Russello* set forth only a "presumption," which may be overcome by legislative history. *See id.* at 23, 26-29 (observing, however, that the legislative history was consistent with its holding). Finally, *Russello*'s broad language is confined to situations where the provisions compared are the same or similar. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) (observing that *Russello* inference "grows weaker with each difference in the formulation of the provisions under inspection"). Here, unlike 18 U.S.C. § 1963(a)'s nearly identical definitions, § 1231(b)(2)'s component parts are not worded or structured similarly or meant to stand alone. And neither the legislative history nor the overall structure and purpose of § 1231(b)(2) supports respondent's argument.

In any case, § 1231(b)(2)(E) *does* expressly set forth the requirement that the government of any removal country accept the alien. Section 1231(b)(2)(E)(vii) specifically references "another country whose government will accept the alien into that country." This seventh subpart is an integral part of § 1231(b)(2)(E) and must be read in conjunction with the first six subparts.[4] It expresses the necessary condition that applies to all removals in the preceding subparts: there must be a government in the country of removal to accept the alien.[5]

Respondent also points to the language of subpart (vii) referring to situations in which it is "impracticable, inadvisable, or impossible" to remove to one of the subpart (i)–(vi) countries, and argues that this gives the Attorney General the authority to remove an alien, without the receiving country's acceptance, if it is practicable, advisable, or possible to do so. Resp. Br. 23. This language, however, merely provides the Attorney General with an option of not

[4] Respondent's interpretation of § 1231(b)(2)(E)(i)–(vi) depends on reading these subparts of subparagraph (E) as "self-contained provisions" severed from the rest of paragraph § 1231(b)(2). Resp. Br. 11, 17-18. But paragraph § 1231(b)(2) is the relevant "self-contained provision," not its constituent subparagraphs and subparts, which must be considered together to discern their overall meaning.

[5] Respondent attempts to minimize the impact of the use of the word "another" in subpart (vii) by arguing that the country in subpart (vii) will be different from the countries in subparts (i)–(vi). Resp. Br. 23 n.9. Respondent supports this view by way of analogy, noting that it would be wholly natural to say that a student "intends to transfer from his current school to another college with a better history department" and this would not imply that the student's current school has a better history department than itself. Of course, by including the phrase "better history department" respondent has not only foreordained the result but has constructed a phrase that has no parallel in the statute. There is no such comparative term in subpart (vii). The better analogy would be to say that the student "intends to transfer from Brown to another college in the Ivy League that will accept him." Acceptance is a prerequisite of the transfer as it was for initial admission to Brown.

removing the alien to one of those qualifying countries even though acceptance could be obtained. In other words, the statute contains no *affirmative* authorization to remove the alien so long as it is "practicable, advisable, or possible" to do so. The limited authority to not remove the alien, for example on grounds of impracticality, should not be confused with the much broader authority respondent advocates—the authority to remove an alien to one of the six countries in (i)–(vi) "even though acceptance cannot be obtained." Resp. Br. 23. This is demonstrated by the fact that the preliminary condition of subpart (vii), "if impracticable, inadvisable or impossible to remove the alien to each country described in a previous clause of this subparagraph," is immediately followed by the specific reference to removal to "another country whose government will accept the alien into that country."

3. *There Is No Grant Of Discretion In Other Parts Of The Statute To Overcome The Acceptance Requirement.*

Respondent attempts to conjure a grant of discretion to remove to the country of nationality without acceptance by arguing that "Congress's use of the permissive term 'may' [in § 1231(b)(2)(C)] indicates that the Secretary is not *required* to 'disregard' the alien's designation even when acceptance is lacking." Resp. Br. 19 (emphasis in original). The limited discretion to disregard an alien's designation if the country does not offer timely acceptance translates, in the view of respondent, to a grant of discretion to *honor* the designation despite the objection or lack of consent of the designated country. Of course, respondent is correct in stating that the word "may" indicates "some degree of discretion." *Id.* But no basis in the plain language of subparagraph § 1231(b)(2)(C) exists for the assertion that the limited discretion to veto an alien's preference encompasses the much broader discretion to disregard a foreign government's lack of consent. The word "may" thus does

not indicate a choice between respecting or ignoring the wishes of the receiving country. Rather, the consequence of the alien's choice not to designate a country, or the Attorney General's exercise of his discretion not to remove the alien to the chosen country, is that the Attorney General will move to the next step of the selection process, set forth in subparagraph (D), to determine whether the "alternative country" of the alien's citizenship or nationality will accept removal.

B. Removal Under § 1231(b)(2) Can Only Be To A Country With A Government That Can Accept The Alien.

Congress did not grant discretion to the Attorney General in this statute to simply find a way to remove aliens to some other place in the world. Thus, when the statute says the Attorney General shall "remove" the alien to a "country," it means there must be a transfer of the alien from the jurisdiction of the United States government to the jurisdiction of the government of a country willing to accept the alien.[6] *Delany v. Moraitis*, 136 F.2d 129, 131 (4th Cir. 1943) ("[T]he deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil * * *. It must be carried out through arrangements made with the foreign government.")

Petitioner's interpretation of the removal statute is rooted in the historical understanding that the country of removal is "a foreign state with the rights and responsibilities under international law of a member of the family of nations." *Ng Kam Fook v. Esperdy*, 320 F.2d 86, 88 (2d Cir.), *cert. denied*, 375 U.S. 955 (1963). This explains why there is always a reference to a "government" of the removal "country" whenever the statute elaborates upon removal. *E.g.*, § 1231(b)(2)(C)(ii)–(iii), § 1231(b)(2)(D); § 1231(b)(2)(E)(vii).

The process of "removal" entails an arrangement with a government of the country of removal to accept the alien and provide the returning alien a legal identity upon arrival. Resp. Br. 31 n.12. Thus removal is accomplished through a mechanism of acceptance and exchange whereby the alien is transferred from the government of the United States to the government of another country.[7]

In the context of the removal statute, the courts have consistently found that the term "country" is more than a

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[6] Respondent raises the preliminary objection that petitioner's argument that Somalia is not a removal "country" as defined in the statute is not properly before the Court. Resp. Br. 26. This issue is fairly included in petitioner's question presented. *See* Sup. Ct. R. 14.1(a); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The issue of acceptance is intimately tied to the issue of Somalia's status as a "country" under the law. If the "country of birth" in § 1231(b)(2)(E)(iv) has no functioning government it cannot accept the alien.

As the Eighth Circuit stated, "if prior acceptance is required, the INS will be unable to return Mr. Jama to Somalia. *This is because Somalia lacks a functioning central government, rendering it impossible for the INS to obtain Somalia's prior acceptance.*" Pet. App. 6a (emphasis added). The dissenting opinion below noted that a "'functioning central government' is an 'essential aspect' of a 'country' to which an alien can be deported." *Id.* at 11a. Furthermore, the specific arguments were fully briefed by both sides at the district court level. *Id.* at 34a n.7. On appeal to the Eighth Circuit the same arguments fell within the question presented, and they were addressed in detail in an amicus brief for rehearing en banc and respondent's response to that brief. Hence, this argument is in support of a claim properly presented and well within the question presented to the Court. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

[7] Respondent suggests that the United States has no acceptance mechanism in place for removal to Mexico other than the unilateral determination of citizenship by U.S. immigration officials and a trip to the border. Resp. Br. 31 n.12. Specific memorandums, however, are in place between the Mexican and American governments regarding the return of foreign nationals, and every week the United States provides the Mexican government with a list of persons to be returned to Mexico.

geographic location. *See Delany*, 136 F.2d at 130 ("But a man's 'country' is more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises sovereign power on behalf of the people."); *Chan Chuen v. Esperdy*, 285 F.2d 353, 353 (2nd Cir. 1960) ("In line with the general Congressional policy of facilitating the deportation of deportable aliens, we think that any place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' under the statute.") (citations omitted); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (concluding that Formosa was a "country" because "there [wa]s a government on Formosa which has undisputed control of the island").

Ying v. Kennedy, 292 F.2d 740 (D.C. Cir. 1961), dealt specifically with the definition of "country" in the context of a step-three removal. In holding that Hong Kong was a "country" under the statute the court reasoned that, in addition to having a defined geographical territory, it had well established, functioning governmental institutions including a legislature and royal governor.[8] "Suffice it to say that Hong Kong has authority to determine whether it will accept a deported alien from the United States." 292 F.2d at 743.

The Board of Immigration Appeals has held that the word "country" in the removal statute means a country with a government. *In re Linnas*, 19 I. & N. Dec. 302 (BIA 1985). In *Linnas*, the BIA listed two prerequisites for a "country": first, "a foreign place with 'territory' in a geographical

[8] In contrast, the Department of Homeland Security has found that Somalia is a lawless place where there is no functioning government. "Major regions of the country are under the control of bandits and the population is beyond the reach of the rule of law." *See DHS Extension of the Designation of Somalia Under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-50 (July 21, 2003).

sense;" and second, "a 'government' in the sense of a political organization that exercises power on behalf of the people subjected to its jurisdiction." *Id.* at 307.[9]

Respondent argues that "country" can mean a geographical region or tract of land without a government. Resp. Br. 26-27. Respondent does not cite a single federal court opinion or administrative decision during the fifty-year life of the subject removal statute interpreting the removal authorization to include deportation to a mere territory, place, or "country" without a government to accept the alien from the United States and thus repatriate him. Respondent instead relies upon *Smith v. United States*, 507 U.S. 197 (1993), which gave a "commonsense meaning" of the term "country" under the FTCA as "'[a] region or tract of land.'" *Id.* at 201 (holding that Antarctica is a "'country, even though it has no recognized government'"). The Court's next sentence, however, warned: "To be sure, this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination." *Id.* The Court reasoned that "[i]f Antarctica were not a 'foreign country,' and for that reason included within the statute's coverage, the FTCA would instruct courts to look to the law of a place that has no law in order to determine the liability of the United States—surely a bizarre result." *Id.* at 201-02.

To hold that "country" in the removal statute simply refers to a tract of land or any such place without a functioning government would lead to "a bizarre result" in this removal case. A tract of land or a war-torn territory without a sovereign government cannot enter into

[9] Contrary to respondent's suggestion, Resp. Br. 45, *Linnas* was not constrained to follow *Tom Man* because it was a Second Circuit decision. *See In re Punu*, 22 I. & N. Dec. 224, 226-27 (BIA 1998) (declining to follow the law of its circuit). No appellate authority contrary to *Tom Man* existed until this case.

repatriation agreements or issue passports or other travel documents to accomplish removal, nor can it accept an individual into its borders. Reading the necessity of a functioning government out of the term "country" in § 1231(b)(2) would mean that the alien could be transferred from the government of the United States to a place or territory where there is no government to assume jurisdiction upon the alien's arrival.

II. The Removal Statute Does Not Grant The Attorney General Policy Discretion To Remove Aliens To Places Without A Government To Accept.

Respondent argues that Congress intended that the Executive should have broad case-by-case discretion to carry out removal in a manner that would best serve the United States. Thus, it argues, if the Attorney General determines that he can physically accomplish removal to a place where there is no government recognized by the United States and that this can be done without harming the diplomatic interest of the United States, then he is operating within the congressional authorization. During the half-century that the removal statute has been in effect, however, it has never been interpreted this way despite Executive Branch arguments and deportation attempts to the contrary.

Respondent does not cite any judicial decision in the past fifty years suggesting that acceptance was only a practical hurdle that the Attorney General could surmount if circumstances warranted. On the contrary, the conduct of the immigration service was always guided by the rule that acceptance by the receiving country was a fundamental condition of removal. *See* INS Operations Instruction 243.1; 8 C.F.R. §§ 241.4(k)(1) & 241.5(c)(1).

In *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959), for example, the immigration authorities planned to deport the alien to his country of birth, China. There was, however, no government in Communist China

through which the United States could make a repatriation arrangement or obtain acceptance. The government argued that it should be able to accomplish removal by bringing the alien to the border of Mainland China to see whether he would be "accepted" without any prior arrangement, and that it should not have had to attempt to gain acceptance from a government in Mainland China, because "to rule otherwise will be to invade the prerogative of the Executive Department by compelling it to do something that would or might be deemed a 'recognition of' the Communist Government." 264 F.2d at 928. Just as in the present case involving Somalia, the planned removal of Tom Man to China involved a situation where: (a) there was no functioning government with whom any repatriation arrangement could be made; (b) the Attorney General claimed that there were important policy reasons underlying the use of his discretion about how to accomplish removal; and (c) the Attorney General said he could accomplish removal without any arrangement for acceptance. But the Second Circuit, like all other federal courts before the Eighth Circuit here, interpreted the removal statute to require acceptance from a government in the removal country at each step of the removal process. *See* 264 F.2d at 928 ("In each case there must be a mutual agreement between that 'country' and ourselves * * *.")

Tom Man was not an isolated decision that usurped Executive discretion to deport to a country having no government to accept the alien. The Cold War and later deportation cases never suggested that removal through arrangements with a government of the removal country, which was capable and willing to accept the alien, was not a fundamental condition of deportation under § 243(a) of the Immigration and Nationality Act of 1952. *See, e.g.*, *Chan Chuen*, 285 F.2d at 353 (government with authority to accept the alien qualifies); *Rogers*, 280 F.2d at 664-65 (the acceptance requirement explained in *Tom Man* was fulfilled

by letter from Consul General of receiving country); *Cheng v. INS*, 521 F.2d 1351, 1353 (3d Cir. 1975) ("there is no appropriate government with which we have diplomatic relations for purposes of directing a request for admission of an alien pursuant to § 1253(a)"); *Pelich v. INS*, 329 F.3d 1057, 1061 (9th Cir. 2003) (step-three removal to alien's country of birth possible assuming the country would take him).[10]

Respondent characterizes petitioner's claim as one that he should not be removed to Somalia because Somalia is a dangerous place where he will be mistreated; respondent then argues that petitioner has already been found ineligible for the statutory human rights protections such as asylum or withholding of removal. Resp. Br. 34-39. This misconstrues petitioner's habeas claim: the Attorney General must comply with the removal statute, which, petitioner contends, requires acceptance from a government in Somalia. The fact that Somalia is a lawless, war-torn place with no government is not the reason why petitioner's habeas relief should be granted, but it underscores that the statutory requirement cannot be satisfied.[11]

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[10] The importance of the acceptance requirement to the removal process is demonstrated by its inclusion in the special statute governing removal of alien terrorists. 8 U.S.C. § 1537(b)(2). If respondent were correct in its assertions about how Congress gave the Executive broad discretion to remove without acceptance on a case-by-case basis, the context where discretion would most likely be needed and claimed would be that of removal of alien terrorists. But "[i]f no country is willing to receive such an alien [terrorist]," then detention is the congressionally mandated alternative. § 1537(b)(2)(C).

[11] Amicus Washington Legal Foundation agrees with the parties that the Court has jurisdiction over petitioner's claim. Amicus Br. 14-15 (concurring that *INS v. St. Cyr*, 533 U.S. 289, (2001) governs petitioner's habeas claim). Amicus nevertheless requests that the Court "address" whether the Court would have jurisdiction over habeas claims of non-criminal aliens. This clearly would constitute an unconstitutional advisory opinion. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.")

III. This Court Should Not Defer To Respondent's New Proposed Rule.

A. This Court's Precedent Bars Deference On This Pure Question Of Law.

Respondent argues that any ambiguity in the statute should be resolved by deferring to the Executive's interpretation. Resp. Br. 27-28.[12] But because this matter can be decided by traditional methods of statutory construction, the Court need not look to additional sources for guidance, such as respondent's new proposed rule (published July 19, 2004, three days before respondent's brief was filed).[13]

In any event, deference to an agency's interpretation of a statute is *not* appropriate on a "pure question of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). In that case, the Court expressly rejected the INS's argument for *Chevron* deference, *see id.* at 446, and remarked that the issue was "well within the province of the judiciary." *Id.* at 448 (comparing statutory requirements for asylum, i.e., a "well founded fear" (of persecution) and

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[12] Although the Executive's immigration powers are *related* to such Executive powers as foreign relations and war powers, the Constitution grants Congress principal authority over immigration and naturalization and over the Executive's role in removing aliens from the United States. U.S. Const. art. I, § 8, cl. 4; *see also* Pet. Br. 17-18. Here, Congress has exercised its power and prescribed a removal process. Given Congress' constitutional authority and action, the Court should not presume that Congress intended to confer upon the Executive the broad discretion respondent suggests.

[13] Comments opposing the new rule were filed on August 18, 2004.

"more likely than not" (to be persecuted)). Section 1231(b)(2) is equally suited to judicial scrutiny.[14]

Cardoza-Fonseca and *St. Cyr* rest on the bedrock principle that it is this Court's province to "say what the law is." That power—and duty—have been unquestioned for over 200 years. *See* The Federalist No. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (rejecting deference as contrary to the task "impose[d] upon the courts"). Here, of course, the courts of appeals are split as to what § 1231(b)(2) requires. Presumably, the Court granted the petition to resolve this conflict. *See* Sup. Ct. R. 10(a).

Yet just as the Court prepares to resolve the issue, respondent's proposed rule attempts to preclude it. Respondent downplays its intentions: it claims that it merely hopes to "eliminate any uncertainty regarding" its *own* interpretation. Resp. Br. 28 & n.11. But the proposed rule's language belies this disclaimer and seeks to settle the circuit split in its favor. *See* 69 Fed. Reg. 42,902 (July 19, 2004) (proposing to amend regulations "in response to this intercircuit conflict"); *id.* at 42,909 ("In light of a conflict among the United States courts of appeals * * * the Secretary of Homeland Security and the Attorney General publish this joint notice * * *.").

[14] The fact that this case arises on habeas review reinforces this point. *See INS v. St. Cyr*, 533 U.S. 289, 312 (2001) (calling habeas review "far narrower than judicial review"). Indeed, *St. Cyr*'s holding that the Court had habeas jurisdiction in spite of Congress' attempt to preclude "judicial review" depends on the fact that habeas cases present questions of law that courts were created to decide.

B. The *Chevron* Doctrine Is Plainly Inapplicable.

This Court has devised a two-step inquiry to determine whether deference is warranted: (1) whether Congress has spoken to the question at issue; and (2) if the statute is ambiguous about that issue, whether the agency's construction is reasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In other words, "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (emphasis added). The sequence is critical: the Court must first attempt to construe the statute using conventional methods.

Petitioner and respondent agree that Congress' intent can be ascertained from the text of § 1231(b)(2), although there is of course a dispute about the result. *Compare* Pet. Br. 17-31 *with* Resp. Br. 16-26. Unlike *Chevron*, the issue here does not concern the meaning of a technical term but the relationship of subsections of a statute—a pure question of law. *See Cardoza-Fonseca*, 480 U.S. at 445-47 & n.30 (rejecting *Chevron* deference because Congress' intent was ascertainable by standard methods of construction); *see also St. Cyr*, 533 U.S. 320 n.45 (applying first "normal" tools of construction).[15] And there is no suggestion here that petitioner is trying here to relitigate an issue previously lost in an administrative "agency * * * but [that] was never waged in Congress." *Chevron*, 467 U.S. at 864. Unlike the EPA's guidance in *Chevron*, respondent's proposed rule cannot resolve petitioner's question of law.

[15] Respondent also cites *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) in support of deference. Resp. Br. 28. Like *Chevron*, that case involved a technical term. *See id* at 423-24 (considering definition of specialized statutory phrase "serious nonpolitical crime"). *Aguirre-Aguirre*'s holding (like *Chevron*'s) is nowhere near as broad as respondent suggests. *See Yu v. Brown*, 92 F. Supp. 2d 1236, 1242 (D.N.M. 2000) (limiting *Aguirre-Aguirre* to definition of "specific statutory term").

Chevron deference also is inappropriate because respondent has overstepped Congress' delegation of authority. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"). Respondent's proposed rule commandeers Congress' general delegation, *see* 8 U.S.C. § 1103(a)(1), and completely re-writes the statute. Respondent unmistakably and improperly wields its proposed regulation "to regulate the scope of the judicial power." *Adams Fruit*, 494 U.S. at 650.

C. Respondent's Proposed Rule Conflicts With Its Past Interpretations.

The weight of respondent's proposed rule "will depend upon the thoroughness evident in [its] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Here, respondent unconvincingly seeks to jettison its interpretive history.

This Court's precedent bars deference to respondent's newfound litigation position. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer because the administrative interpretation was "contrary to the narrow view * * * advocated in past cases"); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (rejecting "appellate counsel's *post hoc* rationalizations for agency action").

Respondent's proposed rule conclusively demonstrates its true intent to escape its own previous, authoritative interpretations. *See* 69 Fed. Reg. at 42,908 ("[a]s *Linnas* [19 I. & N. Dec. 302 (BIA 1985)] * * * fail[s] to consider the statutory requirements, the extant legislative policies, long-standing administrative practice, or the foreign relation implications of these provisions, *the Attorney General departs from* Linnas") (emphasis added). BIA decisions such as *Linnas* indisputably constitute binding agency

interpretations of the acceptance requirement. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30. The proposed rule's omission of the decision in *In re Anunciacion*, 12 I. & N. Dec. 815 (BIA 1968), only highlights respondent's reversal, as that case clearly discussed an acceptance requirement. *See id.* at 818.

Nor do adjudicative pronouncements provide the only glimpse of respondent's consistent past interpretation: its current rules repeatedly invoke an acceptance requirement. *See* 8 C.F.R. §§ 241.4(k)(1), 241.5(c)(1), 241.13(f); *see also* Feb. 2003 Mem. Op., *quoted in* Pet. Br. 36-37. Not coincidentally, respondent proposes to remove each of these references to "acceptance." *See* 69 Fed. Reg. at 42,910.[16]

For these reasons, *Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735 (1996), cannot salvage respondent's argument. *See id.* at 744 n.3 (if "court is addressing transactions that occurred *at a time when there was no clear agency guidance*, it would be absurd to ignore the agency's current authoritative pronouncement") (emphasis added) & 742 (deferring because no "change of official agency position ha[d] occurred"); *see also Pauly v. United States Dep't of Agric.*, 348 F.3d 1143, 1152 (9th Cir. 2003) (holding *Smiley* does not apply to position "represent[ing] an explicit break with prior practice"). Respondent's previous guidance is more than sufficient to foreclose reliance on *Smiley*. At all events, respondent's vested interest in the outcome here sharply contrasts with the agency's non-party position in that case. *Cf. Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs*, 292 F.3d 533, 541 n.7 (7th Cir. 2002) (comparing *Bowen* to deference claim by "agency [that] ha[s] a less-vested interest in the outcome").

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[16] The proposed rule also amends existing regulations to "clarify" that a "country" does not require a "government." 42 Fed. Reg. at 42,910-11.

Several other factors weigh against deference as well. First is the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. Second, as a proposed rule respondent's novel construction is not yet effective. *See Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000).

Third, the proposed rule misconceives the nature of the issue. *See* 69 Fed. Reg. at 42,908 ("the sum of these cases lies in the [undefined] statutory term[ ] of 'accept'"); *see also* Resp. Br. 31 n.12. On the contrary, the definition of "accept" would only be relevant if there were some question about whether Somalia actually had manifested acceptance (i.e., whether oral, written, consular, or some other form). Plainly, the definition of the term is wholly unrelated to *whether* § 1231(b)(2) requires some form of governmental acceptance.

Fourth, respondent's proposed rule improperly blurs the distinction between rule-making and adjudication. *See Bowen*, 488 U.S. at 209 (permitting retroactive adjudication but not rule-making); *id.* at 216-18 (characterizing "rule" as something having "future effect") (Scalia, J., concurring). Though not strictly "retroactive," *see Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 268-70 (1994), respondent's attempt to resolve its own pending litigation by administrative about-face smacks of unfairness. Finally, respondent's interpretation is objectively unreasonable for the various reasons discussed above.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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